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No. 83-1089

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RACK and BALL CLUB, INC.,

Appellant,

vs.

THE KOREAN PRESBYTERIAN
SOUTH CHURCH OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW YORK,
APPELLATE TERM, 2nd AND 11th JUDICIAL DISTRICTS

MOTION TO DISMISS

JOHN D. SAKONA
Counsel for Appellee
159-09 Hillside Avenue
Jamaica, New York 11432
(212) 291-8181

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THE KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK,

Appellee.

MOTION TO DISMISS THE APPEAL BY THE APPELLANT, RACK AND BALL CLUB, INC.

The Korean Presbyterian South Church of New York, appellee, makes this motion for dismissal of the appeal to The Supreme Court of The United State from the opinion of the Supreme Court of the State of New York, Appellate Term, 2nd and 11th Judicial Districts upon which judgment was entered on June 27, 1983, affirming the judgment of the Civil Court of Queens County dated November 5, 1982, and its opinion upon which its order was entered August 24, 1983, granting appellant's motion for reargument, and upon such reargument, adhering to its original decision, and denying leave to appeal to the Appellate Division, and moves to have this court to uphold

the decision of the Civil Court of Queens County of the State of New York which granted the right of immediate possession to the Appellee herein, and that the tenant appellant herein was divested of any interest in the property purchased by appellee from the City of New York in whom title was vested by reason of In Rem foreclosure for non payment of real estate taxes and water and sewer rent taxes owed to the City of New York.

The tenant-appellant contension that the In Rem foreclosure provisions (Administrative Code of the City of New York, Section D17-1.0 et seq) are unconstitutional in so far as they do not require the personal notice of the proceedings to be given to tenants in possession and cites the case of *Mennonite Board of Missions v. Richard C. Adams* NO. 82-11 decided June 22, 1983, as authority. It is to be noted that the case was on Indiana law and not on the New York State In Rem Law, and attention is directed to the case of *Gerald D. Nelson v. City Of New York* (NO. 30) decided December 10, 1956 (352 US 103) wherein Chief Justice Warren upheld the constitutionality of the New York City In Rem Proceedings. Also the New York Court of Appeals in the case of *Sonmax, Inc. v. City Of New York* (43 NY2d 253) upheld the constitutionality of the IN REM foreclosure proceedings of the City of New York local law NO. 45 of 1976.

The main thrust of the appellant's claim is that as a tenant in possession it did not receive personal notice of the In Rem proceedings against the property for taxes against the property it was occupying and therefore its rights under a lease executed in January 6, 1976 after the commencement of the In Rem proceedings was not cut off by the proceedings. This is without merit because the very lease presented in evidence in the lower court trial where the appellant relies for its claim, by its terms and more particularly paragraph 42: "During the term of this lease Tenant, at Tenants own cost and expense, shall furnish the fuel for the heating system in the demised premises and operate, maintain and repair the said heating system and furnish such heating as may be required by the appropriate

authorities. Landlord shall not be required to furnish any hot water to the demised premises or any part thereof and if any hot water be required by Tenant, the facilities thereof shall be furnished and installed by the Tenant at Tenant's own cost and expense. The Tenant shall also provide and pay for its own water, sewer rent, gas, electricity and all other utilities." clearly indicates that the tenant appellant herein should have known and obtained from the City of New York the tax bills for the water and sewer rent taxes for which it was supplied by the City of New York. The facts showed that appellant never paid any water or sewer rent taxes for the entire time that it was in possession of the premises subject of the In Rem foreclosure and further appellant under Sec. D 17-17.0 of Administrative Code, City of New York could have filed with the New York City Tax authority an In Rem card which would have compelled the City of New York to notify in writing the appellant of any In Rem Proceedings, but the appellant chose not to do so. (See Appendix, *supra*) This action by the appellant cannot be deemed to absolve appellant from knowledge of the likelihood of In Rem foreclosure against the property for non payment of water and sewer rent taxes.

CONCLUSION

The appeal from the decision below affirming the provisions of the Administrative Code of The City of New York for notice by publication only, to the tenants in possession of real property under In Rem foreclosure should be denied, and that there are no new questions presented in this appeal and the appeal herein should be denied in all respects.

Respectfully submitted,

JOHN D. SAKONA
Counsel For Appellee
159-09 Hillside Avenue
Jamaica, New York 11432
(212) 291-8181

Appendix

§D17-17.0 Administrative Code of the City of New York

§ D17-17.0 In rem cards; mailing notices to other interested persons.— a. The finance adminstrator shall, in addition to the file maintained by him pursuant to section D17-16.0, maintain a file of in rem cards submitted by any person having an interest in real property who is not entitled to have tax bills mailed to him by the finance administrator, including mortgages, lienors, encumbrancers and owners who have filed owner's registration cards designating someone else to receive bills and notices. Each such in rem card shall be signed by the person filing such card or a duly authorized representavie, shall contain a decription of the premises by reference to the section, block and lot numbers on the tax map and shall state the date on which said card was filed, the full name and post office address of the persons filing said card and the nature of the interest said person has in said premises.

b. The finance adminstrator shall mail a notice of foreclosure and any other process required by this title to each perosn who has filed an in rem card whenever the parcels to which such cards refer are included in a list of delinquent taxes filed pursuant to this title. However, failure to receive such notice or process shall not affect the validity of any proceeding brought pursuant to this title. (Added by L. 1975, ch. 823, August 9, eff. Jan. 1, 1976, which repealed former § D17-17.0; amended by L. 1976, ch. 816, July 26.)